88-578

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1988

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., and PATRICK BURNS,
Petitioners,

against

ROBERT HUGHES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented.

1. Whether the courts below erroneously assumed subject matter jurisdiction (pendent jurisdiction) over state tort claims interposed against petitioners, in view of the rejection of the federal claims (civil rights) by the jury?

2. Whether respondent Hughes had a right to even bring this case in a Federal District Court in view of his failure to prove that the petitioners deprived him of a right secured by the "Constitution and laws" of the United States and failure to show that the petitioners deprived him of this alleged Constitutional right "under color of any stature, ordinances, regulation, custom, or usage, of any state or territory"?

3. Whether respondent used the so called civil rights laws (42 U.S.C. §1983) as a ruse to gain federal jurisdiction over state tort claims?

4. Since the Policemen's Benevolent Association (PBA) is clearly a labor organization, and in view of the claims of respondent that co-petitioner Patrick Burns was responsible for the alleged improper and tortious acts against Hughes, whether under §6 of the Norris-LaGuardia Act (47 Stat.71, 29 U.S.C. §106) the District Court had the right to allow the jury to consider liability of the PBA for the allegedly unlawful or improper acts of an individual officer?

5. Whether there was any basis to submit the question of punitive or exempulary damages to the jury in view of the dearth of evidence of malice on the part of petitioners and in view of the vehemently contested evidence on the question of liability altogether?

6. Since the Circuit Court reversed the judgment allowing duplicate damages for two intentional state torts, whether the refusal of the Circuit Court to disturb the award of punitive damages, which was based upon *both* torts, was plain error?

7. Whether the question of damages ought to be remanded to the District Court for reevaluation altogether in view of the partial reversal of judgment?

8. Whether under the facts of this case, a labor organization such as the PBA, which represents a vast number of police officers, with a duty and obligation to protect their rights in any legitimate way possible, could be held liable in damages at all for the inquiry which was made concerning the circumstances of the death and suicide of Officer Troia?

9. Whether the submission of this case to a jury, under the circumstances herein, cast a chilling effect upon the ability of the PBA to function effectively as a labor organization?

10. Whether the circuit court was justified in considering a "verdict" that was never found by the jury in making its determination of the appeal herein?

11. Whether the District Court should have granted the motion to set aside the verdicts against petitioners in view of the findings of the jurors that no official or state action against the plaintiff existed, and found against the plaintiff on all federal claims?

12. Whether the damages assessed against the respective petitioners were excessive in view of the evidence?

13. Whether the District Court erred in failing to grant petitioners motion for summary judgment?

The Parties.

The parties in the District Court were Robert Hughes, who was the plaintiff and is now the respondent; the Patrolmen's Benevolent Association of the City of New York, Inc. and J. Patrick Burns, who were the defendants and are presently the petitioners; and the New York City Police Department, which was another defendant in the District Court but which is no longer in the case because the jury found that there were no civil rights violations and exonerated the Police Department completely.

In the Circuit Court, the parties are the same as those in this petition.

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Opinion Below.

The opinion of the United States Court of Appeals for the Second Circuit under Docket No. 87-7842 was rendered on the 15th day of June 1988, argument of the appeal having taken place on February 11th 1988. A copy of the opinion is annexed hereto as an exhibit. The decision

and order of the United States Court of Appeals for the Second Circuit filed the 4th day of August 1988 denying rehearing of the appeal, without opinion, is also annexed hereto as an exhibit.

Jurisdiction.

A- The order of affirmance and the opinion of the United States Court of Appeals for the Second Circuit, dated the 15th day of June 1988, is annexed as an exhibit hereto. The respondent, who was the plaintiff in the District Court, namely Robert Hughes, alleged that the New York City Police Department, acting in concert with the Patrolmen's Benevolent Association of the City of New York and J. Patrick Burns, the petitioners herein, conspired to violate his civil rights in derogation of the United States Constitution. The District Court considered this as a case pursuant to 42 U.S.C. §1983, although Hughes never pleaded that section. In addition, Hughes alleged the state torts of "prima facie tort" and "infliction of extreme emotional distress."

Hughes, a Sergeant with the New York City Police Department assigned to the Absence Control Unit of the Health Services Division, claimed that the defendants in the District Court had deprived him of gaining a promotion to Sergeant on Special Assignment and had harassed him and caused him emotional distress by accusing him of having contributed to the suicide of a Police Officer named Troia whom the Health Services Unit of the Police Department had ordered back to limited duty, despite his claim that he was still sick. The defendants patently denied the allegations of plaintiff. The jury found that the City of New York was in no way liable and that no civil rights of the plaintiff Hughes had been violated. They did find that a prima facie tort and a tort of infliction of ex-

treme emotional distress had been committed, both state claims, and as a result they awarded the sum of $100,000.00 against the PBA for the emotional distress; $95,000.00 for the prima facie tort; $175,000.00 in punitive damages against the PBA for a total of $370,000.00. The jury awarded $125,000.00 against petitioner Patrick Burns for the emotional distress on Hughes and $100,000.00 for the prima facie tort. In addition it assessed $175,000.00 for punitive damages totaling $400,000.00 in all. The jury found no violation of any federal civil rights statute as against any defendant on trial.

The judgment insofar as it granted recovery for prima facie tort against the PBA for $95,000.00 and against Burns for $100,000.00 was reversed by the Circuit Court and the awards were vacated. The Circuit Court, however, did not address the question of punitive damages, although that was based upon both torts, and left that intact.

B- The petitioners applied for a rehearing of the determination of the Second Circuit which rehearing was denied by that court on the 4th day of August 1988.

C- The jurisdiction to review the judgment and the order in question by Certiorari is conferred under 28 U.S.C. §1254 and §1257.

Constitutional and Statutory Provisions Involved.

The following statues are involved herein: 42 U.S.C. §1983; 28 U.S.C. §1331 and §1343; 29 U.S.C. §106, known as §6 of the Norris-LaGuardia Act.

The applicable provision of §6 of the Norris-LaGuardia Act is as follows:

> "No officer or member of any association or organization, and no association participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or a ratification of such acts after actual knowledge thereof."

Rule 12 (b) (6) is also involved under the Federal Rules of Civil Procedure which refers to dismissal of a complaint. Sections 1331 or §1343 of Title 28 of the United States Code are also involved because these refer to jurisdiction over federal civil rights actions and the petitioners, as private parties, maintain that they are not within the purview 42 U.S.C. §1983.

Statement of the Case*

In reviewing the facts of this case, we ask this Court to recognize that no where in the plaintiff's complaint did he ever mention 42 U.S.C. §1983. The District Court merely assumed that it should consider the case under that section.

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*In this petition we sometimes refer to the petitioners as "appellants" so as to avoid confusion with the Police Department of the City of New York which is no longer in the case, having been exonerated completely by the verdict of the jury. Hughes is referred to as plaintiff, also to avoid confusion upon this petition for Certiorari. Page references refer to the official court reporter's trial transcript unless otherwise noted.

The appellant's motion for summary judgment therefore should have been granted for that reason and others stated in the record.

The incident that triggered the litigation herein involved an officer named Salvatore Troia who was injured in the line-of-duty on December 28th 1979 at the 19th Police Precint in New York City. His wife testified that he suffered from considerable physical pain as well as serious mental depression. Yet he was ordered to return for limited duty and did so on October 9th 1980. The following day he committed suicide, in the presence of his wife.

Troia was a member of the labor organization known as the Policemen's Benevolent Association, (PBA) one of the petitioners herein. Patrick Burns was a vice president of that organization and had known Troia personally because they had both served together at one time in the police department.

Burns, quite understandably, initiated his own investigation into the tragic death of Troia and also included inquiries into the conduct of the Health Services Division to determine what role that division might have played in Troia's demise.

The Police Department's official report concerning Troia's death included that Sergeant Hughes had no involvement with Troia during the period of his sick-leave.*

Plaintiff, relying solely upon hearsay, complained against both Burns and the PBA that they blamed him for Troia's death and therefore embarked upon a deliberate and malicious campaign aimed at securing "revenge".

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*Mrs. Troia complained to Burns about the abusive treatment that her husband received from Hughes and others at Absence Control shortly before his death.

As a labor organization, the inquiries by the PBA, we maintain, were quite understandable and that organization would have been remiss if it did not make appropriate inquiries into the circumstances of this officer's death, particularly in view of Troia's wife's claims that he was forced back to duty despite being ill and depressed.

Factual Background.

We ask this Court to bear in mind that the United States Court of Appeals for the Second Circuit reversed part of the judgment of the District Court with respect to double recovery for two intentional state torts. The belief, (now recognized to be erroneous by the Circuit Court), held by the trial judge that the jury had the right to award damages on both of the state tort claims, unquestionably, we submit, had an effect upon the jury's verdict. If the jury had been properly instructed and told that they could not award damages on both of the state tort claims, there would have been, in all likelihood, a different damage award completely. The jury was, in essence, permitted to believe that two separate tortious acts occurred, both of which merited the award of damages, plus punitive damages, on *both* torts.

Under the circumstances, we submit that the Circuit Court should have reversed completely, or at least remanded the case with respect to the question of damages.

The Circuit Court did not reverse with respect to the punitive damages awarded even though it held that the jury could not award double damages for two intentional state torts. The punitive damages unquestionably were considered by the jury with respect to both torts and not only one.

Hughes initially filed his complaint in November 1982* alleging various violations of his federal constitutional rights, of the federal civil rights laws, and of state tort law. Jurisdiction was predicated upon 28 USC §1331 §1343 and upon principles of pendent jurisdiction.

In January of 1983, however, plaintiff filed an amended complaint which left his factual allegations substantially unchanged, but which, as the court below noted, "unfortunately, somewhat confused his theories of relief". The District Court denied timely motions to dismiss the complaint which were made by all the defendants, finding that the plaintiff had alleged facts which stated claims under the federal civil rights law, 42 USC §1983, and state common law. The jurisdiction to bring the action in the District Court was held to lie pursuant to either §1331 or §1343. The complaint did not mention 42 U.S.C. §1983.

A motion brought by the present appellants to dismiss the complaint contended that they were only *"private parties" and "not state officers"* and that therefore they were not subject to the strictures of the §1983. The District Judge refused to read the statute as the defendants-appellants contended. The court below refused to rule or decide whether the nexus between New York State and the PBA is generally so close as to subject the PBA to liability on §1983 claims where there is no allegation of joint activity.

The *court, however conceded that neither Burns nor the PBA were state officers* but reasoned that a §1983 remedy "is still available where a plaintiff alleges that a

*Hughes retired six years after the incidents complained of getting an "accident" pension which pays him 3/4 pay, tax free for life. His retirement was not related to this incident.

'private' defendant either was a willful participant in joint activity with a state officer, . . . or was acting as an arm of the State. . . ."

The court denied the motion because of the fact that the complaint alleged facts "which, *if proven,* will show that Burns and the PBA were engaged in joint activity with state officers."

In view of the findings of the jury that the New York City Police Department was not involved at all, we submit that *jurisdiction was lacking ab initio.*

A- *Sergeant Hughes,* who served 6 years after the Troia incident and is now retired, *was an admitted pathological gambler* who not only had to seek psychiatric treatment for this affliction but also declared bankruptcy because of the overwhelming debts which he incurred and could not repay.

He needed psychiatric help.

The thrust of the complaint was that the PBA and Burns had intentionally inflicted emotional distress on him, and in addition had committed a *prima facie* tort against him.

The motion to dismiss and set aside the verdict pointed out to the court below, a fact which the court conceded, that under New York Law, a verdict could not be predicated upon a *prima facie* tort if there was another intentional tort committed by the defendants.

Obviously, in the case at bar, the jury found that the PBA and Burns had intentionally inflicted emotional distress on Robert Hughes, and consequently under New

York Law, upon which the state claims rest, precluded the finding of a *prima facie* tort as an additional theory of relief. While the court below noted that no objection was taken in the court below, we submit that this is a jurisdictional question and consequently can be reviewed by this Court. (See Point I, *infra*).

In addition, however, the motion to set aside the verdict clearly raised this issue and consequently for that reason, too, this Court has jurisdiction.

B- Mrs. Troia had complained to the PBA and Patrick Burns, following her husband's suicide, that she had been present when her husband was examined by the Health Services Unit prior to his having to return to limited duty. She recalled someone yelling at him, whom she believed was Sergeant Hughes and others and described his great mental distress. He had committed suicide by placing a gun in his mouth and discharging it in her presence.

The PBA and Burns had received a number of complaints about Sergeant Hughes and the conduct of the Absence Control Unit and decided that at least some sort of investigation was warranted to determine whether there had been an abuse of conduct or discretion on the part of the plaintiff and the operation of the Absence Control Unit.

A Private Dectective by the name of Branche was hired and he in turn hired another investigator by the name of Walter Cox. They were hired by counsel,* not the PBA.

Although the plaintiff contended that Patrick Burns had announced in front of 400 or 500 PBA delegates at a meeting that plaintiff was responsible for killing officer Troia, there was a total dearth of proof, other than hear-

*This was outside counsel, not in-house counsel.

say, to attest to this claim. Additionally, testimony by defense witnesses demonstrated that not long after the investigation had commenced, it was terminated because nothing substantial turned up.

C- This Court should bear in mind that one of the main claims that plaintiff alleges is that he suffered damages because of the fact that he had been recommended for the position of "Sergeant Special Assignment" which, if it had been granted, would have meant about a $5000.00 (five thousand dollar) a year raise in pay.

There was substantial testimony, however, from high ranking police officials that a very small fraction of those Sergeants who are recommended for this special assignment ever actually get this promotion.

On the other hand, it is relevant that high ranking police officials who testified at the trial revealed that Sergeant Hughes had been extremely indiscreet in contacting a Mr. Downes and telling him that his son "Cubby" was deeply involved in narcotics and needed help. It turned out that this information was totally incorrect.

Furthermore, it appeared that Sergeant Hughes had been moonlighting and giving confidential information about certain aided cases to investigator Cox with whom he had become very friendly, and accepted $150.00 from Cox.

It is, therefore, clear that there was a serious question whether Sergeant Hughes would have ever gotten this promotion under any circumstances.

The law in New York is clear that damages cannot be predicated upon what someone "*might* have earned" but

rather on what he "*would* have earned". Since this promotion was highly speculative and very contingent, there is no way that anyone can determine what Sergeant Hughes "would have earned", because of the fact that he never got the promotion. One thing is clear, that the activities of the PBA and Burns cannot be identified as the competent producing cause of Sergeant Hughes' not getting this promotion. There were many other factors involved which could well have impacted upon this. The jury had no evidence that Hughes would have gotten this promotion, but for the appellants. No one knew why Hughes didn't get the promotion.

Thus the evidence was so thin and confusing that no rational juror could have returned the verdict it did.

The briefs below fully set forth the pertinent facts and we incorporate them by reference.

POINT I.

The Court below erred when it denied the timely motions made by appellants to dismiss the complaint on the grounds that no substantial federal claim existed, and it also erred by retaining subject matter jurisdiction over the state claims against the appellants despite the jury's findings against the federal claims with respect to all the defendants.

The Court below was not justified in exercising pendent jurisdiction over the state claims where it was obvious that the federal actions were totally unjustified in the first place.

The Court, in the case of *Dunton v. County of Suffolk, State of New York,* 729 F.2d 903, modified, 748 F.2d 69

made it crystal clear that District Courts may not exercise pendent jurisdiction over state actions where it's clear that federal claims were too insubstantial to support federal subject matter jurisdiction in the first place. In the *Dunton* case, that Court held that when it becomes obvious that federal claims against private parties, joined in a civil rights action under 42 U.S.C. §1983, are patently meritless and insubstantial, that a District Court is not authorized to retain state claims on the grounds of pendent jurisdiction.

Thus, in *Dunton,* the Court explained (729 F.2d at 911):

> "Thus, we hold that the federal civil rights claims were so insubstantial that the District Court did not have jurisdiction to retain the state claims. Were we to hold otherwise, litigants could move their state claims to the Federal Court by the simple device of joining groundless federal claims unsupported by any facts. See *Morpurgo v. Board of Higher Education,* 423 F.Supp. 704, 718 (S.D.N.Y. 1976) (*pendent jurisdiction fails when federal civil rights claims insubstantial*); *Burnette v. McNabb,* 565 F.2d 398, 400 (6th Cir. 1977) (*Per Curiam*) (*'transfer of jurisdiction to the Federal Courts cannot be accomplished by . . . filing an unsubstantial action under 42 U.S.C. §1983, coupled with a prayer for the exercise of pendent jurisdiction'*)." (Emphasis ours.)

The Court noted that pursuant to New York Civil Practice Law §205 (a), the plaintiff is not precluded from bringing his action in a State Court. The reason for that is that this action, if this Court determines it was not properly brought in a Federal Court, would not be terminated

by a voluntary dismissal or failure to prosecute, or a judgment on the merits.

The plaintiff would have 6 months from the date of this action's dismissal to pursue his claim in the State Court if he desires to do so. (See, *Gaines v. City of New York,* 215 N.Y. 533, 539 (1915) (Cardozo, J.), and *Brown v. Bullock,* 17 A.D.2d 424, 427, 235 N.Y.S.2d 837, 840 (lst Dept. 1962).)

As in the case at bar, the Court noted in *Dunton* that "there is no evidence in the record to support a conspiracy charge under §1983" (*id.* at 911).

It is clear from the reading of the amended complaint in the case at bar, that just as in *Dunton v. County of Suffolk, supra,* the plaintiff herein failed to set forth a proper action under 42 U.S.C. §1983.

Courts have held that where the federal claims were insubstantial, that it may be an abuse of discretion to try a pendent state claim when the underlying federal claims are openly dismissed for failure to state a claim and no prejudice would result from requiring plaintiff to try his case in a State Court. (*Nolan v. Meyer,* 520 F.2d 1276, 1280 (2d Cir.), *cert. denied,* 423 U.S. 1034, 96 S.Ct. 567 . . .) (*id.* at 911). See, *Mine Workers v. Gibbs,* 383 U.S. 715.

Additionally, we submit that just as in *Gibbs,* there is a total absence of evidence in the case at bar to show that either of the defendants were acting under color of state law, and the jury herein so found.

POINT II.

Although the plaintiff, Hughes, alleged certain amorphous civil rights violations which did not even mention 42 USC §1983, we submit that it was clear from the pleadings that this was a case that should have been tried in a State Court and not in a Federal Tribunal under the doctrine of pendent jurisdiction. Both Burns and the PBA are private parties and are not subject to the purview of 42 USC §1983. The jury, not surprisingly, found no violations of any federal statute and we maintain that this Court, in its supervisory power over the lower federal courts, should find that jurisdiction was improvidently exercised by the district judge and this case should be dismissed.

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. (See e.g., *Marbury v. Madison,* 1 Cranch (5 U.S. 80) 137, 173-180, 2 L.Ed. 60 (1803).)

In *Bender v. Williamsport Area School Dist.,* 106 S.Ct. 1326, at 1331, this Court reaffirmed that important principle.

Thus this tribunal has said:

> "For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower court in a cause under review, even though the parties are prepared to concede it. *Mitchell v. Maurer,* 293 U.S. 237, 244, 55 S.Ct. 162, 165, 79 L.Ed. 338 (1934). See *Juidice v. Vail,* 430 U.S. 327, 331-332, 97 S.Ct. 1211, 1215, 51 L.Ed.2d 376 (1977) (Stand-

> ing). (*And if the record discloses that the lower court was without jurisdiction this Court will notice the defect,* although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' *United States v. Corrick,* 298 U.S. 435, 440, 56 S.Ct. 829, 831, 80 L.Ed. 1263 (1936) (footnotes omitted)." (Emphasis ours.)
>
> See also, *Sumner v. Mata,* 449 U.S. 539, 547-548, 101 S.Ct. 764, 769-770; *City of Kenosha v. Bruno,* 412 U.S. 507, 511, 93 S.Ct. 2222, 2225; *Clark v. Paul Gray, Inc.,* 306 U.S. 583, 588, 59 S.Ct. 744, 769; *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 152, 29 S.Ct. 42, 43 (citing cases); and *Cameron v. Hodges,* 127 U.S. 322, 325, 8 S.Ct. 1154, 1155.

In *Bender,* this Court noted that the obligation of the Supreme Court to "notice defects in a Court of Appeals subject-matter jurisdiction assumes a special importance when a constitutional question is presented."

This Court went on to emphasize that the facts of the case are thus extremely important.

In reviewing the facts of the case at bar, we maintain that it is obvious that under no circumstances could any rational jury have found that there was a conspiracy between the petitioners herein and the New York City Police Department to violate the civil rights of Hughes. The pleadings of Hughes do not even suggest any rational basis for finding that such a conspiracy existed and indeed none was proved.

For some inexplicable reason, the Second Circuit referred to the "fact" that the veniremen initially had sought to return a verdict against the parties on the civil rights statute, but ultimately, when the actual verdict was returned, it found no civil rights violations on the part of anybody as against Hughes, and consequently the only verdict that stands is one on purely state causes of action.* These causes of action should have been tried in a state tribunal, not in a federal court under the doctrine of pendent jurisdiction.

Indeed, a review of the United States Court of Appeals opinion herein, demonstrates why this case should never have been tried in the federal court. The District Judge, although being an extremely learned jurist, did not appreciate the fact that under New York Law, which had to be applied herein, there could be *no double recovery* for two intentional torts, e.g., *prima facie tort* and *infliction of emotional distress.* Instead, as the Court of Appeals noted, he erroneously permitted the jury to consider both theories of tort and award damages against the petitioner herein, cumulatively. This error probably impacted on the whole verdict and the damages assessed.

In the case of *United Mine Workers v. Gibbs,* 383 U.S. 715, (1966), this Court plainly stated:

> "Pendant jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience, and fairness to litigants . . . . *needless decisions of state law should be avoided both as a mater of comity and to promote justice between the parties, by pro-*

*The conjecture of the Circuit Court that the jury toyed with the idea of finding a violation of 42 U.S.C. §1983 is irrelevant and immaterial since no such verdict was returned.

> *curing for them a surer footed reading of applicable law.* Finally, there may be reasons independent of jurisdictional considerations, such as the *likelihood of jury confusion* in treating divergent legal theories of relief . . . The question of power will ordinarily be resolved on the pleadings. But the issue whether pendant jurisdiction has been properly assumed is one which remains open through the litigation. (emphasis added).

Elaborate motions were made to dismiss the complaint and to grant summary judgment to the petitioners prior to the trial, at the beginning and even up to the conclusion of the evidence because of the flimsiness of the proof.

We must bear in mind that there is no diversity of citizenship involved in the complaint herein. By this we mean to demonstrate that the state claims could never have been brought in a federal court under any circumstances with the exception of what we denominate as the "ruse" of tacking it on to spurious federal civil rights allegations and then seeking a determination under the doctrine of "pendant jurisdiction."

In *United States v. Corrick,* 298 U.S. 435 (1935), this tribunal made it clear that even if the issue of lack of jurisdiction had never been raised, this Court still retained the power to determine jurisdiction "*sua sponte*". At page 440 of 298 U.S., the court in *Corrick* explained:

> "The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore,

> have declined *sua sponte,* to proceed in the cause. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. While the District Court lacked jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court entertaining the suit. The decree must, therefore, be reversed and the cause remanded with directions to dismiss the bill.
>
> See also: *Cutler v. Rae,* 7 How. 729, 731; *Morris v. Gilmer,* 129 U.S. 315, 325; *Cans v. United States,* 226 U.S. 172; and *Mitchell v. Maurer,* 293 U.S. 237, 244.

This Court has held on more than one occasion that if the record which it reviews discloses that the lower court was without jurisdiction, "this Court will notice the defect, although the parties make no contention concerning it." (*United States v. Corrick,* id; *Perez v. Fernandez,* 202 U.S. 80, 100; *Stratton v. S.W.R.Y.,* 282 U.S. 10, 13); *Mine Workers v. Gibbs, supra.*

It is difficult to understand how the Circuit Court reversed in part the verdict of the District Court and its refusal to dismiss the state claims in view of its determination in *Dunton v. County of Suffolk,* 729 F.2d 903, modified, 748 F.2d 69, since that case made it crystal clear that the Circuit Court opposed the exercise of pendant jurisdiction over state actions where it is manifest that federal claims were too insubstantial to support federal subject matter jurisdiction in the first place. We ask this Court to note that pursuant to the New York Civil Practice Law §205 (a), Hughes is not precluded from bringing his action in a state court if this Court dismisses the case. The plaintiff

would have six months from the date of this action of dismissal to pursue his claim in the state court if he decides to do so. (See, *Gaines v. City of New York,* 215 N.Y. 533, 539 (1915) [Cardozo, J.]; and *Brown v. Bullock,* 17 A.D.2d 424, 427, 235 N.Y.S.2d 837, 840 (1st Dept. 1962).

-A-

Damages sustained were so vague and amorphous as to be *de minimus.*

Factually, we ask this Court to realize that the alleged damages suffered by Hughes were merit dismissal on its fact by the federal court. He was a Sergeant during the time of this incident and did not establish any significant damages whatsoever as a result of the claims that he alleged. He submitted only hearsay allegations that he was harassed by the petitioners. The main object of his grievances were aimed at the petitioner Burns. He asserted that at a meeting, *Burns* referred to him as "Dr. Death." Yet there is no substantiation of that accusation other than hearsay. Burns testified and categorically denied that he ever made such a statement and denied the allegations of the complaint completely. Likewise, President Caruse denied, on behalf of the PBA, that any actions to harass the plaintiff occurred.

Yet Hughes remained as a Sergeant for over 6 years following this incident and suffered no diminution of pay. He asserted that he had hoped to be given a promotion to the position of "Sergeant on Special Assignment" which would have meant a raise in pay. Experts testified, however, on behalf of the police department, that many Sergeants are recommended yearly for the position of "Sergeant On Special Assignment" and yet only a small fraction ever actually receive that status. Furthermore

there was testimony, as appears in the record, that Hughes himself had done several indiscreet things while operating and functioning as a Sergeant, and for those reasons alone might well have been turned down for this "promotion".

Added to this, the claims that the petitioners were acting under "color of state law" because of the fact that they were in a conspiracy with the New York City Police Department was so ridiculous that not one plausible item of fact could be found to substantiate that allegation.

Additionally the court below failed to recognize that the PBA is a *labor union.*

In that capacity the PBA had an obligation to investigate a grievance voiced by the widow of one of its members, namely Officer Troia, who had committed suicide allegedly because of the activities of a member of the Absence Control Unit of the Police Department. The PBA would have been derelict had it not made such an inquiry.

The evidence does not reveal, contrary to the courts below, that the PBA hired any investigators whatsoever to harass the plaintiff Hughes. These investigators were not hired by the PBA. The law offices of Richard Hartman utilized an investigator for a short period of time to inquire into the circumstances of Officer Troia's death, but that investigation terminated when nothing significant was uncovered.

A deceased investigator by the name of Cox, who was a sub-agent of the investigator who was hired by the attorney apparently went way beyond his authority, and in fact gave money to Hughes in connection with totally improper conduct.

Hughes maintained that Cox informed him that he had been told to try to get something on Hughes.

We must bear in mind also that Hughes was an admitted pathological gambler and was under psychiatric treatment for this affliction; had declared bankruptcy because of overwhelming debts which he could not repay and committed several highly questionable errors of judgment which in themselves indicated he was not a fit person for promotion to Sergeant on Special Assignment. We have set this forth in our statement of facts and so it need not be repeated here.

But the thrust of what we are trying to impart to this Court is that Hughes did not establish any meaningful damages. He remained as a police officer in the capacity of a Sergeant for at least 6 years after this incident. He ultimately retired on 3/4 pay totally tax free. His allegations are based primarily upon hearsay. Only Cox was able to say in a deposition where no cross-examination had occurred, that he had been told to setup and even try to frame Hughes.

This, however, does not indicate that state action was involved and at most was a basis for some minimal claims of damage in a state court. Nothing from the police department was alleged to have occurred so far as the case unfolded to the jury.

In sum, we contend that there was no substantial federal claims asserted at all and it was a totally improvident determination by the District Court to maintain pendent jurisdiction over the state claims in this case.

Finally we maintain that the jury, quite understandably found against the plaintiff on all the federal claims of vio-

lations of the his civil rights because no conspiracy was established with the police department. Only by such a conspiracy could any federal claim even be sustained. The verdict of the jury, which rested solely upon state causes of action, clearly indicate that it was a total lack of discretion on the part of the District Judge and an improper retention of jurisdiction over pendent state claims that gave rise to the verdicts in this case.

Federal courts should be discouraged from taking pendent jurisdiction over such causes of action which are purely state matters. A result such as the one herein can only encourage the repetition of activities such as that brought on by plaintiff Hughes whereby flimsy or nonexistent federal civil rights claims are asserted so as to seek to obtain the federal court forum in which to try "pendent" state claims.

Thus under §1983 it is obvious that the plaintiff failed to establish that the petitioners had deprived him of a right secured by the "Constitution and Laws" of the United States and that these petitioners deprived him of this Constitutional right "under color of any statute, ordinances, regulation, custom, or usage, of any state. . ." In other words there was no "color of law" to the actions of the defendants (petitioners) under any circumstances.

As this Court said in *Mine Workers v. Gibbs, supra,* 383 U.S. at 727:

> "The question of power will ordinarily be resolved on the pleadings. *But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation.* Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likeli-

> hood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation, dismissal of the state claim might even then be merited. For example, it may appear that the plaintiff was well aware of the nature of his proofs and the relative importance of his claims; recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. *Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.* (emphasis ours).

We therefore submit that the District Court erred in retaining pendent jurisdiction in view of the flimsiness of the federal claims, and the damages awarded on state claims only were grossly excessive, especially due to incorrectly applying State law.

POINT III.

The PBA is a labor organization and as such had a right and obligation to investigate a grievance asserted by the widow of one of its members who had committed suicide allegedly as a result of harassment by the Absence Control Division of the Police Department. Under the Norris-LaGuardia Act, §6, the PBA should not and could not be held liable under the circumstances of this case.

As *Mine Workers v. Gibbs,* 383 U.S. 715 at 735, teaches, even assuming the conspiracy concept could be kept within proper limits to the application of state tort

law, reversal would nevertheless be required for failure to meet the special proof requirements imposed by §6 of the Norris-LaGuardia Act. That Act (47 Stat. 71, 29 U.S.C. §106) declares as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts, after actual knowledge thereof."

In view of the foregoing Act, we maintain that the activities of Burns or any other individual member could not make the PBA responsible or liable in any court of the United States for the unlawful acts of such individuals.

If the type of harassment and slander which Hughes claimed occurred, actually did happen, it would have been totally outside the purview of the authority of these individuals and therefore could not be binding upon the labor union known as the PBA. *Ergo* the PBA could not be held liable, and certainly as to it, there should be a reversal of judgment.

We hasten to add, that under no circumstances do we concede or even suggest that the verdict as against Burns was proper because of the arguments we have already made and because of the arguments we shall make *infra*. We are merely pointing out that under the Norris-LaGuardia Act, the union itself, namely the PBA, should not have been held liable.

There is no evidence of ratification on the part of the PBA of any acts of firebrands or other intemperate members of the union, assuming such persons exist.

We are aware that the Labor Management Relations Act, including §303 (29 U.S.C. §152 (13); §185 (e), 187 (b)) slightly attenuated the impact of §6 of the Norris-LaGuardia Act, but *Mine Workers v. Gibbs,* also notes that congress did not overrule the Norris-LaGuardia Act and this Court's decision in *Brotherhood of Carpenters v. United States,* 330 U.S. 395, 403 has not been overruled either.

Thus in *Mine Workers v. Gibbs,* 383 U.S. at 736 and 737 this Court made it clear:

> "Yet although the legislative history indicates that Congress was well aware of the *Carpenters* decision, it did not repeal §6 outright, but left it applicable to cases not arising under the new Act. This selectivity is not surprising, for on state claims, though not on §303 claims, punitive damages may be recovered. The driving force behind §6 and the opposition to §303, even in its limited form, was the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control. *Plainly, §6 applies to federal court adjudications of state tort claims arising out of labor disputes,* whether or not they are associated with claims under §303 to which the section does not apply." (Emphasis ours.)

These statutes likewise have an impact upon the punitive damages which were assessed. But punitive damages are not permitted, except for violent acts.

In *Local 20 Teamsters, Etc Union v. Morton,* 377 U.S. 252, 84 S.Ct. 1253, Morton was awarded not only compensatory damages as against the union but also punitive damages. There had been no violence found in connection with these activities in the *Morton* case. The Supreme Court, however, overruled the award of punitive damages.

The court noted that the award of punitive damages was contrary to congressional mandates where violence was not involved. No violence occurred herein.

In the case at bar, however, not only is there no basis for the award of punitive damages, but there is equally no grounds for any damages at all because of the nature of the proof, its flimsiness, and the fact that the activities of the union itself had not been proven to have been the cause of the damages herein if any.

POINT IV.

The District Judge, as the Circuit Court recognized, misunderstood the state law applicable to this case as a result of which he permitted the jury to consider cumulative damages upon two state tort claim theories, despite the fact that New York law is clear that recovery of damages can only rest upon one of those torts and not both. Accordingly the jury's deliberation and its award of damages was tainted and confused by the incorrect application of the state law. This Court should therefore remand for a new trial on the issue of damages, assuming it does not dismiss for an improvident retention of pendent jurisdiction.

We have set forth in some detail that the District Court and the court below erred in finding that pendent jurisdic-

tion was appropriately held in this case. We pointed out, further, that certainly the union, that is the PBA, should not have been assessed with any damages whatsoever, particularly since it was only the actions of individuals, if any, who caused the alleged damages to the plaintiff, and secondly under the Norris-LaGuardia Act, §6, the law is clear that a union cannot be held liable for the unauthorized actions of individual employees or members.

Coupled with the foregoing is the fact that the damages awarded were predicated upon such amorphous and speculative "evidence" that the jury was totally unjustified in returning the type of verdict that it did.

Amply confirming and corroborating the decisions of this Court and other tribunals that the federal courts should hesitate to retain pendent jurisdiction which require them to apply state law, is the fact that the District Judge herein misunderstood the state law applicable to this case and allowed the jury to consider its verdict on the state tort claims with a view toward awarding cumulative damages on both torts rather than damages only upon one of the two torts, if at all.

The Circuit Court recognized that damages could not be awarded cumulatively on two separate intentional state torts predicated upon the same activity.

It is evident that the jury must have been confused and incited to award larger damages because they were told that they could find damages on both of the torts presented to them rather than one.

To exacerbate the situation further, however, the jury awarded *punitive* damages on both of the state tort

claims, although the state law clearly indicates that damages may only be awarded on one of those claims.

Without recognizing a distinction the Circuit Court did not disturb the award of punitive damages although it was asked to do so, and despite the fact that clearly the jury considered the verdicts cumulatively in awarding punitive damages.

At page 1319 thru 1321 of the record it is clear that the jury was asked whether they found that the PBA intentionally inflicted emotional distress on Hughes.

They were then asked whether they found that the PBA committed a prima facie tort on Hughes. After that, based upon both of those verdicts, they were asked "do you find that punitive damages are justified against the PBA?"

The same questions were posed as to the co-petitioner, J. Patrick Burns.

From the foregoing it is obvious that the jury predicated its award of punitive damages upon both theories of recovery rather than one or the other.

We submit that from the facts of this case, the damages allegedly proved which involved no apparent loss of earnings, except speculatively, no physical injury, continued employment in the same rank for 6 more years after the incident herein, and retirement upon 3/4 pay, tax free for life, do not indicate any serious damages at all. The proof of damages rested primarily upon hearsay statements and upon the deposition of a deceased investigator by the name of Cox who was a criminal, had been fired by the

attorneys for the PBA and had an ax to grind against the defendants.

This case dramatically illustrates the sagacity of this Court's admonition in *United Mine Workers v. Gibbs,* where it said, *inter alia:*

> ". . . needless decision of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer footed reading of applicable law . . . [and] the likelihood of jury confusion in treating divergent legal theories of relief . . ."

We submit therefore that the damages were totally unjustified, based upon an improper and mistaken application of state law and totally unjustified in any respect.

Conclusion.

The order of the Circuit Court so far as it affirmed the judgment of the District Court should be reversed with instructions to dismiss the action and remand it to the state courts. In the alternative, damages as against the PBA should be vacated since it is a labor union. In the further alternative, the damages should be reduced substantially and punitive damages should be vacated completely.

Respectfully submitted,

IRVING ANOLIK
Attorney for petitioners
(A Member Of The Bar Of This Court)
225 Broadway, Suite 1915
New York, New York 10007
(212) 732-3050

Certification.

IRVING ANOLIK, a member of the Bar of this Court, *certifies* that a true copy of the within Petition for a Writ of Certiorari was duly served by personal delivery and by first class mail to the attorney for respondent at that attorney's designated address: Denise Dunleavy, Esq. 11 Park Place, New York, N.Y. 10007, on the 29th of Sept. 1988.

September 29, 1988

IRVING ANOLIK

Appendix A—Order Denying Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 4th day of August one thousand nine hundred and eighty-eight

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ROBERT HUGHES,

Plaintiff-Appellee,

v.

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., J. PATRICK BURNS, and THE CITY OF NEW YORK, POLICE DEPARTMENT

Defendants,

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., J. PATRICK BURNS,

Defendants-Appellants.

Docket No. 87-7842

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

counsel for the Appellants Patrolmen's Benevolent Association of the City of New York, Inc., J. Patrick Burns.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

Appendix B—Opinion and Order of Reversal and Affirmance (in Part)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 639—August Term 1987

(Argued February 11, 1988—Decided June 15, 1988)

Docket No. 87-7842

ROBERT HUGHES,

Plaintiff-Appellee,

v.

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., J. PATRICK BURNS, and THE CITY OF NEW YORK, POLICE DEPARTMENT,

Defendants,

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., J. PATRICK BURNS,

Defendants-Appellants.

Before:

LUMBARD and CARDAMONE, *Circuit Judges* and LEISURE, *District Judge.**

The Patrolmen's Benevolent Association of the City of New York and J. Patrick Burns appeal from the June 9, 1987 judgment of the United States District Court for the Southern District of New York (Owen, J.) entered after a jury trial. The judgment held each defendant-appellant liable for torts committed against plaintiff-appellee Robert Hughes and for punitive damages.

Judgment and damages reversed in part, and affirmed in part.

Irving Anolik, New York, New York, *for Defendant-Appellant.*

Edward P. Dunphy, New York, New York (Denise M. Dunleavy, New York, New York, of counsel), *for Plaintiff-Appellee.*

CARDAMONE, *Circuit Judge:*

The Patrolmen's Benevolent Association of the City of New York (PBA) and J. Patrick Burns appeal from a June 9, 1987 judgment in favor of appellee Robert Hughes in the United States District Court for the Southern District of New York (Owen, J.) following a jury trial. This appeal is from a jury verdict awarding Hughes substantial damages for intentional infliction of emotional distress and prima facie tort as well as awarding punitive damages. The jury found that appellants embarked on a

*Honorable Peter K. Leisure, United States District Judge for the Southern District of New York, sitting by designation.

deliberate and malicious vendetta against the plaintiff aimed at securing revenge for actions which the appellants should have known he did not do. The jury verdict here furthers Bacon's dictate that because revenge is a form of "wild justice," the "more ought law to weed it out." F. Bacon, *Of Revenge,* in *Essays or Counsels—Civil and Moral, reprinted in* 3 Harvard Classics 15 (C.W. Eliot ed. 1909).

FACTS

Plaintiff Robert Hughes, a New York City Police Sergeant since 1964, was assigned on September 10, 1979 to the Absence Control Unit of the Police Department's Health Services Division. His duties involved preventing abuse by police officers of the Police Department's unlimited sick leave policy. Deputy Chief Ryan, the commanding officer of the Health Services Division and Sgt. Hughes' supervisor in 1979-80, credited Hughes with reducing absenteeism and saving the Department several million dollars in 1980 as compared to 1979. Based on this performance, he recommended Hughes for a promotion to Sergeant Special Assignment with a concomitant raise.

The incident that triggered this litigation involved Police Officer Salvatore Troia, who was injured on December 28, 1979 while on duty at the 19th Precinct. According to his wife, Troia, despite suffering from physical pain and serious depression, appeared as ordered on October 9, 1980 for limited duty. The next day he committed suicide.

Appellant Burns—a police officer for over 30 years—was on "full excusal" from duty at the time of Troia's suicide and was serving as a First Vice-President of the PBA, the labor union representing police officers, and as a Trustee of the New York City Pension Board, which determined disability pensions for members of the police de-

partment. In 1979 Officer Burns was assigned to the 19th Precinct where he had served with his friend, Officer Troia. Burns testified at trial that two members of the Health Services Division, Sergeants Cruse and Powers, had visited Officer Troia at his home during his period of sick leave. But, according to Hughes, Troia had never been classified as a sick leave abuser and had never come under his supervision or investigation.

On October 10, 1980—the same date of Officer Troia's suicide—the PBA initiated its own investigation into what role the Health Services Division might have played in his death. The Police Department's official report concerning Troia's death concluded that Sergeant Hughes had no involvement with Troia during the period of sick leave.

The core of Hughes' claim against Burns and the PBA is that they blamed him for Troia's death and, as a result, embarked on a deliberate and malicious vendetta against him aimed at securing revenge. Hughes introduced evidence that the PBA hired two investigators to look into his involvement in the suicide and that the PBA told the investigators that it wanted him transferred out of the Health Services Division "any way you can"—even if it meant framing him. As a result of appellants' campaign of harassment and the false dissemination to Hughes' fellow officers that Sergeant Hughes was responsible for Troia's suicide, many referred to Hughes as "Dr. Death." Hughes claimed that appellants' tactics resulted in harassment of him and his wife, caused him to be involuntarily transferred, discussed below, and denied him the promotion and raise recommended by Ryan. A substantial amount of highly contested testimony was admitted concerning the nature of and activities constituting this campaign of harassment.

Hughes claimed that Burns, the PBA, and the Police Department conspired to transfer him out of the Health Services Division. After Troia's death, appellee was trans-

ferred involuntarily from Health Services to applicant processing, then to applicant investigations, and finally to street patrol in a Queens precinct. While on patrol Hughes sustained two injuries that eventually led to his retirement on a disability pension on December 10, 1986.

PROCEEDINGS BELOW

Hughes instituted this action in 1982 against appellants and the New York City Police Department alleging federal civil rights claims pursuant to 42 U.S.C. § 1983 (1982) and state common law tort claims. An amended complaint alleged the following three causes of action against Burns, PBA, and the New York City Police Department: prima facie tort, intentional infliction of emotional distress, and deprivation of civil rights. Jurisdiction was based on 28 U.S.C. § 1331.

Appellants first objected to the district court entertaining jurisdiction when they moved under Fed. R. Civ. P. 12(b)(6) to dismiss appellee's complaint. They argued that, as private parties, they were not subject to liability under § 1983 and hence, absent federal question jurisdiction under § 1331, the district court also lacked pendent jurisdiction over the state law claims. The district court denied the motion to dismiss on the ground that a private defendant is subject to § 1983 liability when that party willfully participates in joint activity with a state officer. *See United States v. Price,* 383 U.S. 787, 794 (1966). The court ruled that the complaint "clearly pleaded factual allegations which undoubtedly raise a claim pursuant to § 1983" such that the court's jurisdiction rested either on § 1331 or § 1343 (jurisdiction over federal civil rights actions).

The case proceeded to trial and the jury found the PBA liable on the state law claims and awarded Hughes $370,000 in damages, allocated as follows: intentional in-

fliction of emotional distress, $100,000; prima facie tort, $95,000; and punitive damages, $175,000. The jury found Burns liable on the same claims and awarded Hughes $400,000, allocated as follows: intentional infliction of emotional distress, $125,000; prima facie tort, $100,000; and punitive damages, $175,000. Hughes' total award from the jury amounts to $770,000. The New York City Police Department was not found liable on any grounds. Consistent with the joint activity theory that provided federal jurisdiction and the verdict as to the Police Department, neither the PBA nor Burns was held liable for violating Hughes' civil rights.

Subsequent to the jury trial and the entry of an adverse judgment,the PBA and Burns moved pursuant to Fed. R. Civ. P. 59 for a new trial, arguing that the finding of liability was against the weight of the evidence, that the jury award for both prima facie tort and intentional infliction of emotional distress constituted an improper double recovery, and that the overall damage award was grossly excessive. The district court rejected the challenges to the finding of liability and the amount of the overall award on the grounds that the evidence supported the jury's finding that the PBA and Burns "maliciously and deliberately destroyed" Hughes' career and that the award was not excessive. The district court also rejected appellants' objection to recovery under both state law tort theories. After noting appellants' failure previously to advance their double recovery argument and their consent to the form and accompanying instructions furnished to the jury, the district court found that the jury form—which specified the amount of damages caused by each defendant for each tort—prevented the prohibited award of a "double recovery."

We reverse the Judgment insofar as it found appellants liable under both tort theories and otherwise affirm.

DISCUSSION

Several arguments are made on appeal. First, appellants assert that the district court should have dismissed the federal claim—or not retained jurisdiction over it—and concurrently should have declined to exercise pendent jurisdiction over the state law claims. Second, they claim that the trial court misconstrued New York law when it permitted the jury to consider separate, non-exclusive damages for two intentional torts. Third, they argue that the overall damage award of $770,000 is grossly excessive. Appellants contend in addition that the evidence in support of the punitive damages award is insufficient, that damages arising from allegedly lost wages should not have been submitted to the jury, and that their cross-examination of Officer Troia's widow was improperly circumscribed. We discuss each argument in turn.

I *Federal Jurisdiction*

Appellants urge that from the inception of this suit not even a "scintilla" of evidence supported appellee's § 1983 claim that the PBA and Burns conspired with the New York City Police Department to violate appellee's civil rights. They argue that Hughes contrived the federal civil rights suit in order to invoke pendent jurisdiction over the state claims. Jurisdiction in this case was wholly premised on allegations that a conspiracy existed between private party appellants and the New York City Police Department, the only alleged state actor. Appellants contend Hughes' suit should have been dismissed when they originally made their 12(b)(6) pretrial motion because the complaint failed to allege facts sufficient to establish the conspiracy, or later during the trial when the transparency of the federal claim surfaced. The federal claims, appellants continue, should never have been submitted to the jury.

Moreover, since the jury found that the Police Department was not liable, appellants argue that this proves jurisdiction never existed. We discuss the issue of jurisdiction as it arose before, during, and after the trial.

The exercise of federal jurisdiction must first be tested against the allegations in the complaint. To withstand a motion to dismiss, a federal claim must be stated with "substance sufficient to confer subject matter jurisdiction." *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). The required specificity of pleadings must be examined by the standard that "complaints containing only 'conclusory,' 'vague,' or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed." *Ostrer v. Aronwald,* 567 F.2d 551, 553 (2d Cir. 1977) (*per curiam*). Specificity is required in order "to enable [defendants] intelligently to prepare their defense." *Id.*Hughes did not allege that the PBA is a state actor itself for state action purposes. Rather, appellee's § 1983 claim and its jurisdictional counterpart, 28 U.S.C. § 1343, rested on allegations that the New York City Police Department participated in the conspiracy, thus constituting joint activity considered to be state action by all parties involved. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 152 & n.7 (1970) (private party involved in a conspiracy liable under § 1983 if private party a "willful participant in joint activity with the State or its agents") (quoting *United States v. Price,* 383 U.S. at 794). Hughes alleged that the PBA and Burns conspired with Hughes' commanding officers in the Police Department to cause the loss of his position in the Health Services Division. The complaint further alleged that the PBA and Burns—with the knowledge and express or implied consent of the Police Department—hired private investigators and placed Hughes under surveillance in violation of his constitutional rights. In an allegation directed solely at the Police Department, the complaint asserted that the De-

partment's Internal Affairs Division—through its knowledge and inactivity concerning the campaign of harassment directed at Hughes—violated his rights. Moreover, appellee alleged that the Police Department demanded that he voluntarily request a transfer before it unilaterally transferred him. Thus, viewing the complaint on its face, it alleged facts sufficient to establish—assuming the facts were proven—a violation of § 1983. In light of this, the district court properly rejected appellants' Rule 12(b)(6) motion to dismiss made prior to trial for want of federal subject matter jurisdiction and correctly held that jurisdiction existed either pursuant to 28 U.S.C. § 1331 or 1343.

We turn next to appellants' argument that, as it became evident during the trial that the § 1983 claim was without merit, the district court should have dismissed this claim and declined jurisdiction. Federal subject matter jurisdiction may be raised at any time during litigation and must be raised *sua sponte* by a federal court when there is an indication that jurisdiction is lacking. Fed. R. Civ. P. 12(h)(3); *Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326, 1331 (1986) (jurisdiction of federal courts must be assured even if conceded); *see Dunton v. County of Suffolk*, 729 F.2d 903, 910 (2d Cir. 1984) ("[T]he district court has an obligation to examine the substantiality of the federal claims throughout the litigation.").

If, during the course of trial, it becomes apparent that the federal claims are discernibly meritless, both the federal and pendent state law claims must be dismissed. *See United Mine Workers*, 388 U.S. at 727; *Dunton*, 729 F.2d at 910-11; *Crane Co. v. American Standard, Inc.*, 603 F.2d 244, 254 (2d Cir. 1979). For the district court to retain jurisdiction, a federal claim must be supported by some evidence. In this case, the record contains evidence of the Police Department's involvement in the alleged conspiracy to destroy appellee's career. The proof re-

vealed detailed accounts of the Department's promotion system; the activity or inactivity of its Internal Affairs Division; and the knowledge, endorsement, and assistance by the Department to the PBA and Burns in their efforts. The evidence pointed to the relationship between the Department and appellants in the dissemination of accusations that blamed Hughes for Troia's death. This evidence was plainly sufficient for the district court to retain jurisdiction.

Appellants' final jurisdictional point derives from the fact that the jury returned a verdict finding that they and the Police Department were not liable to Hughes on his cause of action under § 1983. Somehow appellants believe that this demonstrates that federal jurisdiction was lacking *ab initio*. Interestingly, the jury originally returned a verdict holding that the appellants and the City of New York had violated Hughes' civil rights and making a substantial award. The trial court properly ruled that this verdict was inconsistent with the jury's answers to certain interrogatories, and directed the jury to deliberate further. The findings in the jury's amended verdict that the New York City Police Department was not liable to Hughes and that the appellants—under the joint activity theory—were not acting under color of state law when they committed torts against appellee does not affect the sufficiency of the complaint. Plainly, a federal claim need not be one guaranteed to succeed to gain entrance to a federal forum. In fact, appellants' argument that appellee's § 1983 cause of action is jurisdictionally defective because of a negative jury verdict itself borders on being frivolous.

II *Recovery for Two Separate State Torts*

Appellants next assert that the district court erred in permitting the jury to consider damages for two inten-

tional torts under the pendent state common law claims: intentional infliction of emotional distress and prima facie tort. Appellee counters that these two torts involve different wrongs and cause different injuries—economic versus emotional injuries—and that, in any case, intentional infliction of emotional distress is not a traditional tort which precludes separate recovery for a prima facie tort. We disagree with these contentions.

Under New York law, a traditional tort, as opposed to a prima facie tort, is any "specific recognized tort." *Board of Educ. v. Farmingdale Classroom Teachers Assoc.*, 38 NY2d 397, 406 (1975). Intentional infliction of emotional distress has been recognized as an independent tort in New York for over a quarter of a century. *Halio v. Lurie,* 15 AD2d 62 (2d Dept. 1961).

Justice Holmes' view that alleging "the intentional infliction of temporal damage" states a cause of action which "requires a justification if the defendant is to escape . . . ." *Aikens v. Wisconsin,* 195 U.S. 194, 204 (1904), later evolved in New York into the prima facie tort. The elements of that tort are: (1)intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful. *Burns Jackson Miller Summit & Spitzer v. Lindner,* 59 NY2d 314, 332 (1983).

The existence of a traditional tort does not foreclose pleading a prima facie tort, but double recovery is not allowed. *Id.* at 332-33. In short,

> [w]here relief may be afforded under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort. However, where a traditional tort remedy exists, a party will not be foreclosed from pleading, as al-

ternative relief, a cause of action for prima facie tort.

Freihofer v. Hearst Corp., 65 NY2d 135, 143 (1985). Here, it was proper to allow plaintiff to plead, in the alternative, both torts. Further, evidence may be admitted, argument made, and jury instructions given with respect to each. What New York law prohibits is recovery of damages for both a traditional tort such as the intentional infliction of emotional distress and for a prima facie tort.

The district court opined that any double recovery problem was prevented or cured by the court's careful jury form that compelled the jury to state the amount of damages awarded for each tort against each defendant. Yet, neither the jury charge, jury form, or jury verdict divided the damages according to the type of damages, as the appellee argues. Moreover, appellee in his brief on appeal asserts that after the PBA began "its campaign against him" he was unable to socialize with fellow officers and that this conduct caused his transfer "out of applicant investigations." Hughes continues that "the impact of all this, including the lack of camaraderie and the lack of possibilities for future advancement in the department was devastating." In sum, appellee alleges that appellants' conduct caused both his emotional distress and his lost wages, the theory behind both torts.

Although special damages are not required to be pleaded to maintain a claim for intentional infliction of emotional distress, *see Henaghan v. Dicuia,* 98 AD2d 742 (2d Dept. 1983); *Long v. Beneficial Fin. Co.*, 39 AD2d 11, 14 (4th Dept. 1972); *Halio,* 15 A.D.2d at 65, all compensarory damages, including special damages, caused by the commission of a traditional tort are recoverable in one cause of action; that is, those responsible for a tortious injury must respond for all damages resulting from their conduct. *See* 36 NY Jur.2d *Damages* § 53 (1984). Since a

traditional tort here provides compensation for the conduct giving rise to liability, the nontraditional prima facie tort cannot also provide damages for the same injuries caused by the same conduct. To allow a recovery for both torts would permit the double recovery rejected by New York's highest court in *Burns Jackson* and *Freihofer.* Thus, the judgment holding the PBA liable to Hughes for $95,000 and Burns liable to Hughes for $100,000 for prima facie tort must be reversed and the jury awards in those amounts vacated.

Appellants further argue that New York law requires that no prima facie tort action or award may survive unless the defendant's sole motivation was "disinterested malevolence" directed toward the plaintiff, *see Rodgers v. Grow-Kiewit Corp.-Mk,* 535 F. Supp. 814, 816 (S.D.N.Y.), *aff'd mem.,* 714 F.2d 116 (2d Cir. 1982), and absent evidence to demonstrate such a malevolent motivation this tort should not have been charged to the jury. In light of our reversal of the recovery for the prima facie tort, it is unnecessary to discuss or rule on this argument.

III *Basis for and Amount of Damages*

We next consider appellants' contention that there is insufficient evidence to support the damages awarded to Hughes for intentional infliction of emotional distress. This tort "predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society." *Freihofer,* 65 NY2d at 144; *see Fischer v. Maloney,* 43 NY2d 553, 557-58 (1978); *Restatement (Second) of Torts* § 46(1) (1965). Evidence in the record both supports and contradicts Hughes' argument that appellants' effort to drive him out of the Health Services Division rose to this level. Given that contested facts were at the heart of this issue, the district court properly denied

appellants' motion for summary judgment. Hence, the focus of review is on the jury charge regarding intentional infliction of emotional distress, which stated:

> The second claim, intentional infliction of emotional distress, is defined as follows: One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. Liability is to be found only where the conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.

This jury charge conforms in all respects to New York's strict requirements for the tort of intentional infliction of emotional distress as expressed in *Fisher* and the Restatement (Second) of Torts. *See Martin v. Citibank, N.A.*, 762 F.2d 212, 220 (2d Cir. 1985). We think reasonable jurors could have determined that Hughes prevailed on each required element to establish the commission of this tort.

A similar analysis applies to appellants' claim that there is insufficient evidence to support the jury's award for punitive damages. We recognize that punitive damages are an extraordinary sanction. We also recognize that an award of punitive damages is reversed only when it is "so high as to shock the judicial conscience and constitute a denial of justice." *Zarcone v. Perry,* 572 F.2d 52, 56-57 (2d Cir. 1978). The "shock the conscience" test is also used to determine whether the trial court abused its discretion in refusing to reduce a jury award, *Nairn v. National R.R. Passenger Corp.*, 837 F.2d 565, 566-67. To determine whether discretion has been abused an appellate court must make its own "detailed appraisal of the evidence bearing on damages." *Grunenthal v. Long Island Rail Road Co,* 393 U.S. 156, 159 (1968). In the case at bar

the trial court charged the jury that it could award punitive damages only if appellants' acts were "malicious," "inspired by ill will," or in "wanton and reckless disregard of the plaintiff's rights," but that such damages were "only to be awarded for the most offensive conduct." The Jury determined that appellants' conduct rose to that level. After examining the evidence bearing on damages, we decline to disturb its verdict.

Another contested issue is whether damages allegedly arising from appellee's lost wages should have been submitted to the jury. Appellants argue that any such award would be based on pure speculation. Considerable evidence—which the jury was free to credit or discredit—was introduced to explain Hughes' failure to obtain the job of Sergeant Special Assignment with a salary and pension increase. Some of this proof suggested that Hughes' chances for promotion but for appellants' activities were good, some indicated that they were poor. Given that the jury was adequately charged with respect to both theories, resolution of this issue lay squarely with it.

Appellants additionally assert that the overall verdict of $770,000 is so excessive as to suggest the possibility that it was the result of passion or prejudice and that such a result should be remedied on appeal. *See Pefect Fit Indus., Inc. v. Acme Quilting Co.,* 494 F. Supp. 505, 508-09 (S.D.N.Y. 1980); *see also Zarcone,* 572 F.2d at 56-57. They claim that the total award is so high as to shock the judicial conscience—the same standard as that applied to an award of punitive damages. *Zarcone,* 572 F.2d at 56-57. In our view the overall damages which we have reduced to $575,000 in this case are not so grossly excessive as to shock our conscience. Consequently, there is no need for a new trial on damages.

Finally, the trial court, over objection, permitted appellee's counsel to read into the record an affidavit of Officer Troia's widow under Fed. R. Evid. 901(b)(l) and (7), but

refused to permit appellants' counsel to use an amended bill of particulars from a related suit to cross-examine her for possible impeachment purposes. This ruling is confided to the sound discretion of the trial judge which, absent an abuse of that discretion, must stand. *See, e.g. United States v. Esdaille,* 769 F.2d 104, 108 (2d Cir.), *cert. denied,* 474 U.S. 923 (1985). We see no such abuse here.

CONCLUSION

The Judgment insofar as it granted recovery for prima facie tort against the PBA for $95,000 and Burns for $100,000 is reversed and these awards are respectively vacated. The judgment is otherwise affirmed in all respects.

Reversed in part, and affirmed in part.

So ordered

Clerk

Appendix C—Order Denying Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 4th day of August one thousand nine hundred and eighty-eight.

ROBERT HUGHES,

Plaintiff-Appellee,

v.

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., J. PATRICK BURNS, and THE CITY OF NEW YORK, POLICE DEPARTMENT,

Defendants,

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., J. PATRICK BURNS,

Defendants-Appellants.

Docket No. 87-7842

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants Patrolmen's Benevolent Association of the City of New York, Inc., J. Patrick Burns.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

United States Court of Appeals
Filed Aug 4, 1988
Elaine B. Goldsmith, Clerk
Second Circuit

Appendix D—Opinion and Order of Reversal and Affirmance (in Part).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 639—August Term 1987
(Argued February 11, 1988—Decided)
Docket No. 87-7842

ROBERT HUGHES,

Plaintiff-Appellee,

v.

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., J. PATRICK BURNS, and THE CITY OF NEW YORK, POLICE DEPARTMENT, PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., J. PATRICK BURNS,

Defendants-Appellants.

Before:

Lumbard and Cardamone, *Circuit Judges* and Leisure, *District Judge.**

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*Honorable Peter K. Leisure, United States District Judge for the Southern District of New York, sitting by designation.

The Patrolmen's Benevolent Association of the City of New York and J. Patrick Burns appeal from the June 9, 1987 judgment of the United States District Court for the Southern District of New York (Owen, J.) entered after a jury trial. The judgment held each defendant-appellant liable for torts committed against plaintiff-appellee Robert Hughes and for punitive damages.

Judgment and damages reversed in part, and affirmed in part.

Irving Anolik, New York, New York, *for Defendant-Appellant.*

Edward P. Dunphy, New York, New York (Denise M. Dunleavy, New York, New York, of counsel), *for Plaintiff-Appellee.*

CARDAMONE, *Circuit Judge:*

The Patrolmen's Benevolent Association of the City of New York (PBA) and J. Patrick Burns appeal from a June 9, 1987 judgment in favor of appellee Robert Hughes in the United States District Court for the Southern District of New York (Owen, J.) following a jury trial. This appeal is from a jury verdict awarding Hughes substantial damages for intentional infliction of emotional distress and prima facie tort as well as awarding punitive damages. The jury found that appellants embarked on a deliberate and malicious vendetta against the plaintiff aimed at securing revenge for actions which the appellants should have known he did not do. The jury verdict here furthers Bacon's dictate that because revenge is a form of "wild justice," the "more ought law to weed it out." F. Bacon, *Of Revenge,* in *Essays or Counsels—Civil and Moral, reprinted in* 3 Harvard Classics 15 (C.W. Eliot ed. 1909).

FACTS

Plaintiff Robert Hughes, a New York City Police Sergeant since 1964, was assigned on September 10, 1979 to the Absence Control Unit of the Police Department's Health Services Division. His duties involved preventing abuse by police officers of the Police Department's unlimited sick leave policy. Deputy Chief Ryan, the commanding officer of the Health Services Division and Sgt. Hughes' supervisor in 1979-80, credited Hughes with reducing absenteeism and saving the Department several million dollars in 1980 as compared to 1979. Based on this performance, he recommended Hughes for a promotion to Sergeant Special Assignment with a concomitant raise.

The incident that triggered this litigation involved Police Officer Salvatore Troia, who was injured on December 28, 1979 while on duty at the 19th Precinct. According to his wife, Troia, despite suffering from physical pain and serious depression, appeared as ordered on October 9, 1980 for limited duty. The next day he committed suicide.

Appellant Burns—a police officer for over 30 years—was on "full excusal" from duty at the time of Troia's suicide and was serving as a First Vice-President of the PBA, the labor union representing police officers, and as a Trustee of the New York City Pension Board, which determined disability pensions for members of the police department. In 1979 Officer Burns was assigned to the 19th Precinct where he had served with his friend, Officer Troia. Burns testified at trial that two members of the Health Services Division, Sergeants Cruse and Powers, had visited Officer Troia at his home during his period of sick leave. But, according to Hughes, Troia had never been classified as a sick leave abuser and had never come under his supervision or investigation.

On October 10, 1980—the same date of Officer Troia's suicide—the PBA initiated its own investigation into what role the Health Services Division might have played in his death. The Police Department's official report concerning Troia's death concluded that Sergeant Hughes had no involvement with Troia during the period of sick leave.

The core of Hughes' claim against Burns and the PBA is that they blamed him for Troia's death and, as a result, embarked on a deliberate and malicious vendetta against him aimed at securing revenge. Hughes introduced evidence that the PBA hired two investigators to look into his involvement in the suicide and that the PBA told the investigators that it wanted him transferred out of the Health Services Division "any way you can"—even if it meant framing him. As a result of appellants' campaign of harassment and the false dissemination to Hughes' fellow officers that Sergeant Hughes was responsible for Troia's suicide, many referred to Hughes as "Dr. Death." Hughes claimed that appellants' tactics resulted in harassment of him and his wife, caused him to be involuntarily transferred, discussed below, and denied him the promotion and raise recommended by Ryan. A substantial amount of highly contested testimony was admitted concerning the nature of and activities constituting this campaign of harassment.

Hughes claimed that Burns, the PBA, and the Police Department conspired to transfer him out of the Health Services Division. After Troia's death, appellee was transferred involuntarily from Health Services to applicant processing, then to applicant investigations, and finally to street patrol in a Queens precinct. While on patrol Hughes sustained two injuries that eventually led to his retirement on a disability pension on December 10, 1986.

Proceedings Below

Hughes instituted this action in 1982 against appellants and the New York City Police Department alleging federal civil rights claims pursuant to 42 U.S.C. § 1983 (1982) and state common law tort claims. An amended complaint alleged the following three causes of action against Burns, PBA, and the New York City Police Department: prima facie tort, intentional infliction of emotional distress, and deprivation of civil rights. Jurisdiction was based on 28 U.S.C. § 1331.

Appellants first objected to the district court entertaining jurisdiction when they moved under Fed. R. Civ. P. 12(b)(6) to dismiss appellee's complaint. They argued that, as private parties, they were not subject to liability under § 1983 and hence, absent federal question jurisdiction under § 1331, the district court also lacked pendent jurisdiction over the state law claims. The district court denied the motion to dismiss on the ground that a private defendant is subject to § 1983 liability when that party willfully participates in joint activity with a state officer. *See United States v. Price,* 383 U.S. 787, 794 (1966). The court ruled that the complaint "clearly pleaded factual allegations which undoubtedly raise a claim pursuant to § 1983" such that the court's jurisdiction rested either on § 1331 or § 1343 (jurisdiction over federal civil rights actions).

The case proceeded to trial and the jury found the PBA liable on the state law claims and awarded Hughes $370,000 in damages, allocated as follows: intentional infliction of emotional distress, $100,000; prima facie tort, $95,000; and punitive damages, $175,000. The jury found Burns liable on the same claims and awarded Hughes $400,000, allocated as follows: intentional infliction of emotional distress, $125,000; prima facie tort, $100,000; and punitive damages, $175,000. Hughes' total award

from the jury amounts to $770,000. The New York City Police Department was not found liable on any grounds. Consistent with the joint activity theory that provided federal jurisdiction and the verdict as to the Police Department, neither the PBA nor Burns was held liable for violating Hughes' civil rights.

Subsequent to the jury trial and the entry of an adverse judgment, the PBA and Burns moved pursuant to Fed. R. Civ. P. 59 for a new trial, arguing that the finding of liability was against the weight of the evidence, that the jury award for both prima facie tort and intentional infliction of emotional distress constituted an improper double recovery, and that the overall damage award was grossly excessive. The district court rejected the challenges to the finding of liability and the amount of the overall award on the grounds that the evidence supported the jury's finding that the PBA and Burns "maliciously and deliberately destroyed" Hughes' career and that the award was not excessive. The district court also rejected appellants' objection to recovery under both state law tort theories. After noting appellants' failure previously to advance their double noting appellants recovery argument and their consent to the form and accompanying instructions furnished to the jury, the district court found that the jury form—which specified the amount of damages caused by each defendant for each tort—prevented the prohibited award of a "double recovery."

We reverse the judgment insofar as it found appellants liable under both tort theories and otherwise affirm.

Discussion

Several arguments are made on appeal. First, appellants assert that the district court should have dismissed the federal claim—or not retained jurisdiction over it—and concurrently should have declined to exercise pen-

dent jurisdiction over the state law claims. Second, they claim that the trial court misconstrued New York law when it permitted the jury to consider separate, non-exclusive damages for two intentional torts. Third, they argue that the overall damage award of $770,000 is grossly excessive. Appellants contend in addition that the evidence in support of the punitive damages award is insufficient, that damages arising from allegedly lost wages should not have been submitted to the jury, and that their cross-examination of Officer Troia's widow was improperly circumscribed. We discuss each argument in turn.

I *Federal Jurisdiction*

Appellants urge that from the inception of this suit not even a "scintilla" of evidence supported appellee's § 1983 claim that the PBA and Burns conspired with the New York City Police Department to violate appellee's civil rights. They argue that Hughes contrived the federal civil rights suit in order to invoke pendent jurisdiction over the state claims. Jurisdiction in this case was wholly premised on allegations that a conspiracy existed between private party appellants and the New York City Police Department, the only alleged state actor. Appellants contend Hughes' suit should have been dismissed when they originally made their 12(b)(6) pretrial motion because the complaint failed to allege facts sufficient to establish the conspiracy, or later during the trial when the transparency of the federal claim surfaced. The federal claims, appellants continue, should never have been submitted to the jury. Moreover, since the jury found that the Police Department was not liable, appellants argue that this proves jurisdiction never existed. We discuss the issue of jurisdiction as it arose before, during, and after the trial.

The exercise of federal jurisdiction must first be tested against the allegations in the complaint. To withstand a

motion to dismiss, a federal claim must be stated with "substance sufficient to confer subject matter jurisdiction." *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). The required specificity of pleadings must be examined by the standard that "complaints containing only 'conclusory,' 'vague,' or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed." *Ostrer v. Aronwald,* 567 F.2d 551, 553 (2d Cir. 1977) (per curiam). Specificity is required in order "to enable [defendants] intelligently to prepare their defense." *Id.*

Hughes did not allege that the PBA is a state actor itself for state action purposes. Rather, appellee's § 1983 claim and its jurisdictional counterpart, 28 U.S.C. § 1343, rested on allegations that the New York City Police Department participated in the conspiracy, thus constituting joint activity considered to be state action by all parties involved. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 152 & n.7 (1970) (private party involved in a conspiracy liable under § 1983 if private party a "willful participant in joint activity with the State or its agents") (quoting *United States v. Price,* 383 U.S. at 794). Hughes alleged that the PBA and Burns conspired with Hughes' commanding officers in the Police Department to cause the loss of his position in the Health Services Division. The complaint further alleged that the PBA and Burns—with the knowledge and express or implied consent of the Police Department—hired private investigators and placed Hughes under surveillance in violation of his constitutional rights. In an allegation directed solely at the Police Department, the complaint asserted that the Department's Internal Affairs Division—through its knowledge and inactivity concerning the campaign of harassment directed at Hughes—violated his rights. Moreover, appellee alleged that the Police Department demanded that he voluntarily request a transfer before it unilaterally trans-

ferred him. Thus, viewing the complaint on its face, it alleged facts sufficient to establish—assuming the facts were proven—a violation of § 1983. In light of this, the district court properly rejected appellants' Rule 12(b)(6) motion to dismiss made prior to trial for want of federal subject matter jurisdiction and correctly held that jurisdiction existed either pursuant to 28 U.S.C. § 1331 or § 1343.

We turn next to appellants' argument that, as it became evident during the trial that the § 1983 claim was without merit, the district court should have dismissed this claim and declined jurisdiction. Federal subject matter jurisdiction may be raised at any time during litigation and must be raised *sua sponte* by a federal court when there is an indication that jurisdiction is lacking. Fed. R. Civ. P. 12(h)(3); *Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326, 1331 (1986) (jurisdiction of federal courts must be assured even if conceded); *see Dunton v. County of Suffolk*, 729 F.2d 903, 910 (2d Cir. 1984) ("[T]he district court has an obligation to examine the substantiality of the federal claims throughhout the litigation.").

If, during the course of trial, it becomes apparent that the federal claims are discernibly meritless, both the federal and pendent state law claims must be dismissed. *See United Mine Workers*, 388 U.S. at 727; *Dunton*, 729 F.2d at 910-11; *Crane Co. v. American Standard Inc.*, 603 F.2d 244, 254 (2d Cir. 1979). For the district court to retain jurisdiction, a federal claim must be supported by some evidence. In this case, the record contains evidence of the Police Department's involvement in the alleged conspiracy to destroy appellee's career. The proof revealed detailed accounts of the Department's promotion system; the activity or inactivity of its Internal Affairs Division; and the knowledge, endorsement, and assistance by the Department to the PBA and Burns in their efforts. The evidence pointed to the relationship between the De-

partment and appellants in the dissemination of accusations that blamed Hughes for Troia's death. This evidence was plainly sufficient for the district court to retain jurisdiction.

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tional infliction of emotional distress is not a traditional tort which precludes separate recovery for a prima facie tort. We disagree with these contentions. Under New York law, a traditional tort, as opposed to a prima facie tort, is any "specific recognized tort." *Board of Educ. v. Farmingdale Classroom Teachers Assoc.,* 38 NY2d 397, 406 (1975). Intentional infliction of emotional distress has been recognized as an independent tort in New York for over a quarter of a century. *Halio v. Lurie,* 15 AD2d 62 (2d Dept. 1961). Justice Holmes' view that alleging "the intentional infliction of temporal damage" states a cause of action which "requires a justification if the defendant is to escape . . . ." *Aikens v. Wisconsin,* 195 U.S. 194, 204 (1904), later evolved in New York into the prima facie tort. The elements of that tort are: (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful. *Burns Jackson Miller Summit & Spitzer v. Lindner,* 59 NY2d 314, 332 (1983).

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> [w]here relief may be afforded under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort. However, where a traditional tort remedy exists, a party will not be foreclosed from pleading, as alternative relief, a cause of action for prima facie tort.

Freihofer v. Hearst Corp., 65 NY2d 135, 143 (1985). Here, it was proper to allow plaintiff to plead, in the alternative, both torts. Further, evidence may be admitted, argument made, and jury instructions given with respect

to each. What New York law prohibits is recovery of damages for both a traditional tort such as the intentional infliction of emotional distress and for a prima facie tort.

The district court opined that any double recovery problem was prevented or cured by the court's careful jury form that compelled the jury to state the amount of damages awarded for each tort against each defendant. Yet, neither the jury charge, jury form, or jury verdict divided the damages according to the type of damages, as the appellee argues. Moreover, appellee in his brief on appeal asserts that after the PBA began "its campaign against him" he was unable to socialize with fellow officers and that this conduct caused his transfer "out of applicant investigations." Hughes continues that "the impact of all this, including the lack of camaraderie and the lack of possibilities for future advancement in the department was devastating." In sum, appellee alleges that appellants' conduct caused both his emotional distress and his lost wages, the theory behind both torts.

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$95,000 and Burns liable to Hughes for $100,000 for prima facie tort must be reversed and the jury awards in those amounts vacated.

Appellants further argue that New York law requires that no prima facie tort action or award may survive unless the defendant's sole motivation was "disinterested malevolence" directed toward the plaintiff, *see Rodgers v. Grow-Kiewit Corp.-Mk,* 535 F. Supp. 814, 816 (S.D.N.Y.), *aff'd mem.,* 714 F.2d 116 (2d Cir. 1982), and absent evidence to demonstrate such a malevolent motivation this tort should not have been charged to the jury. In light of our reversal of the recovery for the prima facie tort, it is unnecessary to discuss or rule on this argument.

III *Basis for and Amount of Damages*

We next consider appellants' contention that there is insufficient evidence to support the damages awarded to Hughes for intentional infliction of emotional distress. This tort "predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society." *Freihofer,* 65 NY2d at 144; *see Fischer v. Maloney,* 43 NY2d 553, 557-58 (1978); *Restatement (Second) of Torts* § 46(1) (1965). Evidence in the record both supports and contradicts Hughes' argument that appellants' effort to drive him out of the Health Services Division rose to this level. Given that contested facts were at the heart of this issue, the district court properly denied appellants' motion for summary judgment. Hence, the focus of review is on the jury charge regarding intentional infliction of emotional distress, which stated:

> The second claim, intentional infliction of emotional distress, is defined as follows: One who by extreme and outrageous conduct intentionally or

> recklessly causes severe emotional distress to another. Liability is to be found only where the conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.

This jury charge conforms in all respects to New York's strict requirements for the tort of intentional infliction of emotional distress as expressed in *Fisher* and the Restatement (Second) of Torts. *See Martin v. Citibank, N.A.*, 762 F.2d 212, 220 (2d Cir. 1985). We think reasonable jurors could have determined that Hughes prevailed on each required element to establish the commission of this tort. A similar analysis applies to appellants' claim that there is insufficient evidence to support the jury's award for punitive damages. We recognize that punitive damages are an extraordinary sanction. We also recognize that an award of punitive damages is reversed only when it is "so high as to shock the judicial conscience and constitute a denial of justice." *Zarcone v. Perry*, 572 F.2d 52, 56-57 (2d Cir. 1978). The "shock the conscience" test is also used to determine whether the trial court abused its discretion in refusing to reduce a jury award, *Nairn v. National R.R. Passenger Corp.*, 837 F.2d 565, 566-67. To determine whether discretion has been abused an appellate court must make its own "detailed appraisal of the evidence bearing on damages." *Grunenthal v. Long Island Rail Road Co.*, 393 U.S. 156, 159 (1968). In the case at bar the trial court charged the jury that it could award punitive damages only if appellants' acts were "malicious," "inspired by ill will," or in "wanton and reckless disregard of the plaintiff's rights," but that such damages were "only to be awarded for the most offensive conduct." The jury determined that appellants' conduct rose to that

level. After examining the evidence bearing on damages, we decline to disturb its verdict.

Another contested issue is whether damages allegedly arising from appellee's lost wages should have been submitted to the jury. Appellants argue that any such award would be based on pure speculation. Considerable evidence—which the jury was free to credit or discredit— was introduced to explain Hughes' failure to obtain the job of Sergeant Special Assignment with a salary and pension increase. Some of this proof suggested that Hughes' chances for promotion but for appellants' activities were good, some indicated that they were poor. Given that the jury was adequately charged with respect to both theories, resolution of this issue lay squarely with it.

Appellants additionally assert that the overall verdict of $770,000 is so excessive as to suggest the possibility that it was the result of passion or prejudice and that such a result should be remedied on appeal. *See Perfect Fit Indus., Inc. v. Acme Quilting Co.,* 494 F. Supp. 505, 508-09 (S.D.N.Y. 1980); *see also Zarcone,* 572 F.2d at 56-57. They claim that the total award is so high as to shock the judicial conscience—the same standard as that applied to an award of punitive damages. *Zarcone,* 572 F.2d at 56-57. In our view the overall damages which we have reduced to $575,000 in this case are not so grossly excessive as to shock our conscience. Consequently, there is no need for a new trial on damages.

Finally, the trial court, over objection, permitted appellee's counsel to read into the record an affidavit of Officer Troia's widow under Fed. R. Evid. 901(b)(l) and (7), but refused to permit appellants' counsel to use an amended bill of particulars from a related suit to cross-examine her for possible impeachment purposes. This ruling is confided to the sound discretion of the trial judge which, absent an abuse of that discretion, must stand. *See, e.g., United States v. Esdaille,* 769 F.2d 104, 108 (2d Cir.),

cert. denied, 474 U.S. 923 (1985). We see no such abuse here.

CONCLUSION

The judgment insofar as it granted recovery for prima facie tort against the PBA for $95,000 and Burns for $100,000 is reversed and these awards are respectively vacated. The judgment is otherwise affirmed in all respects.

Reversed in part, and affirmed in part.

So Ordered
Clerk